NO. AP-75,207

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE JOSE ERNESTO MEDELLIN

ON APPLICATION FOR A WRIT OF HABEAS CORPUS FROM
CAUSE NO. 675430 IN THE 339TH DISTRICT COURT OF HARRIS COUNTY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ORAL ARGUMENT REQUESTED

REQUEST FOR ORAL ARGUMENT

The United States respectfully requests that this Court hear oral argument in this case and that the United States be permitted to participate in the argument as amicus curiae. This case involves novel and complex issues of international law, presidential authority, and federal preemption on which the United States has a unique perspective. In view of that perspective, and in light of the President's determination that the United States' compliance with the decision of the International Court of Justice in *Mexico v. United States (Matter of Avena and Other Mexican Nationals*), 2004 I.C.J. 128 (Mar. 31, 2004), should be achieved by the enforcement of the *Avena* decision in state courts in accordance with principles of comity, the United States submits that its participation in oral argument will assist the Court in resolving the issues of constitutional law raised by Medellin's application.

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STATEMENT OF THE CASE

Applicant Medellin, a Mexican national, was convicted in 1994 on two counts of rape-related murder and was sentenced to death. After his convictions and death sentences were affirmed on direct review, Medellin claimed for the first time in his initial application for state habeas corpus relief that state authorities violated Article 36 of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 100-101, by failing to provide required information concerning consular assistance following his detention. The state district court concluded that Medellin's Vienna Convention claim was procedurally barred and in any event could not be sustained on the merits. *Ex parte Medellin*, Cause No. 675430-A (339th Dist. Ct. Jan. 22, 2001). This Court, on review of the record, denied habeas corpus relief. *Ex parte Medellin*, No. 50,191-01 (Tex. Ct. Crim. App. Oct. 3, 2001). Medellin thereafter sought federal habeas corpus relief on his Vienna Convention

claim. The district court denied relief on procedural and substantive grounds, *Medellin v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. Jan. 26, 2003), and the Fifth Circuit denied a certificate of appealability that would have permitted further review of Medellin's Vienna Convention claim. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004).

On March 31, 2004, before the Fifth Circuit had ruled, the International Court of Justice (ICJ) issued its decision in *Mexico v. United States (Matter of Avena and Other Mexican Nationals*), 2004 I.C.J. 128. In *Avena*, the ICJ held that United States had violated Article 36 of the Vienna Convention by failing to inform Medellin and the other Mexican nationals of their right to have Mexican consular officials notified of their detentions so that consular assistance might be provided. The ICJ made additional findings with respect to violations of Mexico's rights under Article 36(1)(a) and (c). *Avena*, ¶ 153(6) and (7). The ICJ found that the appropriate remedy "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [covered] Mexican nationals." Id. at ¶ 153(9). The ICJ envisioned that the required "review and reconsideration" would be judicial in nature and would not be barred by domestic rules of procedural default, so that consideration would be given to the "full weight of the violation of the rights set forth in the Vienna Convention," and a case-by-case determination made as to whether the violation "caused actual prejudice to the defendant in the process of the administration of criminal justice." Id. at ¶¶ 138-141; see also id. at

¶¶ 107-114.

After the Fifth Circuit denied a certificate of appealability, Medellin petitioned for Supreme Court review, arguing that he was entitled to "review and reconsideration" of his previously rejected Vienna Convention claim by virtue of the ICJ's *Avena* decision. The Supreme Court granted certiorari. 125 S. Ct. 686 (2004). During the course of the Supreme Court litigation, the President determined that "the United States will discharge its international obligations" under the *Avena* decision "by having State courts give effect to the decision in accordance with general principles of comity" in cases involving any of the covered Mexican nationals. See Addendum A-3. On March 24, 2005, Medellin filed the instant successive application in this Court for state habeas corpus review, invoking both the *Avena* decision and the President's determination as new factual or legal developments under Article 11.071, section 5(a)(1), of the Texas Code of Criminal Procedure.

Because of these developments, and because of threshold procedural barriers that could foreclose the availability of federal habeas corpus relief, the Court dismissed the writ of certiorari as improvidently granted. *Medellin v. Dretke*, 125 S. Ct. 2088, 2090 (2005) (per curiam). In so doing, the Supreme Court specifically noted that the instant "state-court proceedings may provide Medellin with the very reconsideration of his Vienna Convention claim that he now seeks." Id. at 2089. This Court has ordered briefing on the question whether the President's determination or the *Avena* decision

itself constitute either a "factual or legal basis for a claim that was unavailable" at the time Medellin filed his initial application for state habeas corpus relief. See Tex. Code Crim. Proc., Art. 11.071, § 5 (2005).

QUESTION PRESENTED

Whether this Court should authorize consideration on the merits of Medellin's successive application for state habeas corpus relief, either in light of the President's foreign policy determination that substantive state court "review and reconsideration" of Medellin's Vienna Convention claim is required in order to comply with the United States' international treaty obligations, or in light of the decision of the International Court of Justice in *Mexico v. United States (Matter of Avena and Other Mexican Nationals*), 2004 I.C.J. 128 (Mar. 31, 2004), ordering that Medellin and similarly situated Mexican nationals be given "review and reconsideration" of their Vienna Convention claims without regard for state procedural bars.

INTEREST OF THE UNITED STATES

This Court invited the Attorney General to state the views of the United States. The Solicitor General of the United States authorized the filing of an amicus brief, and this brief responds to that invitation.

STATEMENT

1. The Vienna Convention. In 1969, after the Senate provided its advice and consent, see 115 Cong. Rec. 30,997, the United States ratified the Vienna Convention,

Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 201. Article 36 of the Vienna Convention, 21 U.S.T. 100-101, 596 U.N.T.S. 292-293, is designed to "facilitat[e] the exercise of consular functions relating to nationals of the sending State." Toward that end, Article 36(1)(a) provides that "consular officers shall be free to communicate with nationals of the sending State and to have access to them."

Article 36 further provides that "[i]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." Article 36(1)(b). In addition, "[a]ny communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay." Ibid. State authorities "shall inform the person concerned without delay of his rights under [Article 36]." Ibid.

Article 36(1)(c) also provides that "consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." It specifies that consular officers also "have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment." Ibid. At the same time, it provides that "consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action." Ibid.

The rights referred to in Article 36(1) "shall be exercised in conformity with the laws and regulations of the receiving State." Article 36(2). That requirement is "subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." Ibid.

An Optional Protocol to the Vienna Convention, which the United States also ratified in 1969, 21 U.S.T. 77, provides that "disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning the Compulsory Settlement of Disputes Art. I, 21 U.S.T. 326, 596 U.N.T.S. 488. Any party to the Optional Protocol may bring a dispute with another party to the Optional Protocol to the International Court of Justice. Ibid.

2. State Court Proceedings. a. Applicant Medellin is a Mexican national who has continually resided in the United States since his pre-school years. In 1993, he confessed to participating in the gang rape and murder of two girls. He was convicted of capital murder and sentenced to death. Medellin did not assert any claim under the Vienna Convention at trial or at sentencing. *Medellin* v. *Dretke*, 125 S. Ct. at 2089. This Court affirmed Medellin's convictions and death sentences. *Medellin v. State*, No 71,997 (Tex. Cr. App. 1997). Medellin raised numerous issues on appeal, but he did not raise a Vienna Convention claim.

b. In state habeas corpus proceedings, Medellin claimed for the first time that the

failure of state authorities to inform him of his rights under the Vienna Convention required reversal of his conviction and sentence. The state trial court rejected that claim on four grounds. *Ex parte Medellin*, Cause No. 675430-A (339th Dist. Ct. Jan. 22, 2001). First, the court held that Medellin was procedurally barred from raising his Vienna Convention claim in post-conviction proceedings because he failed to raise it at trial. Second, the court held that Medellin had failed to show that he was a foreign national. Third, the court held that, as a private individual, Medellin lacked standing to enforce the Vienna Convention. Finally, the court held that Medellin failed to show that he was harmed by the alleged Vienna Convention violation because he was "provided with effective legal representation" and his "constitutional rights were safeguarded." Finding the trial court's findings and conclusions supported by the record, this Court summarily denied relief. *Ex parte Medellin*, No. 50,191-01 (Tex. Cr. App. Oct. 3, 2001).

3. The Federal District Court's Decision On Habeas. Medellin then petitioned for federal habeas corpus relief, claiming that he was not informed of his rights under the Vienna Convention and that he was therefore entitled to a new trial. The district court rejected that claim. *Medellin v. Cockrell*, Civ. No. H-01-4078 (S.D. Tex. Jan. 26, 2003). The district court first held that Medellin's failure to raise his Vienna Convention claim at trial in accordance with Texas' contemporaneous objection rule constituted an adequate and independent state ground barring federal habeas court review. In reliance on *Breard v. Greene*, 523 U.S. 371, 375-376 (1998) (per curiam), the district court rejected

Medellin's claim that Vienna Convention claims are exempt from the procedural default doctrine. The district court also rejected Medellin's argument that it should follow the intervening decision of the ICJ in *Federal Republic of Germany v. United States* (*The LaGrand Case*), 2001 I.C.J. 466 (June 27, 2001) (*LaGrand*). In that case, the ICJ concluded that Article 36(1) "creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in [the ICJ] by the national State of the detained person." Id. ¶ 77, at 493. The ICJ further concluded that the application of procedural default to preclude the LaGrands from challenging their convictions and sentences violated Article 36(2) because it "had the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" Id. ¶ 91, at 497-498. The district court refused to follow the *LaGrand* court's procedural default ruling on the ground that it conflicted with *Breard*.

The district court further held that, even if Medellin could surmount his procedural default, he would not be entitled to relief. The court explained that the state court's ruling that private individuals lack standing to enforce the Vienna Convention was consistent with controlling Fifth Circuit precedent, and that the announcement of a new rule that the Vienna Convention creates judicially enforceable rights would be barred on habeas review under *Teague v. Lane*, 489 U.S. 288 (1989). Finally, the district court held that, even if procedural default and non-retroactivity principles did not bar Medellin's claim, and even if he had standing to assert a Vienna Convention claim, *Breard* would require

him to establish that the denial of his Vienna Convention rights caused "concrete, non-speculative harm." The district court concluded that the state habeas court's determination that Medellin had failed to make such a showing was not "contrary to, or an unreasonable application of, federal law" (citing 28 U.S.C. 2254(d)(1)). The court therefore denied Medellin's claim for federal habeas relief as well as his application for a certificate of appealability that would permit appellate review of his claim.

The Fifth Circuit denied a certificate of appealability as well. *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004). It held that Medellin's Vienna Convention claim failed both because it had been procedurally defaulted and because "the Vienna Convention * * * does not confer an individually enforceable right." Id. at 280.

4. The ICJ's Decision In Avena. While Medellin's application for a COA was pending in the Fifth Circuit after the district court's denial of federal habeas relief, the ICJ issued its decision in *Mexico v. United States (Matter of Avena and Other Mexican Nationals)*, 2004 I.C.J. 128 (Mar. 31, 2004) (*Avena*). In that case, Mexico alleged violations of the Vienna Convention with respect to a number of Mexican nationals facing the death penalty, including Medellin. As in *LaGrand*, the ICJ concluded that Article 36(1)(b) gives detained foreign nationals individual rights that the national's State may invoke in a proceeding before the ICJ. Id. at ¶ 40. The ICJ further found that the United States had violated Article 36(1)(b) by not informing 51 Mexican nationals, including Medellin, of their Vienna Convention rights, and by not notifying consular

authorities of the detention of 49 Mexican nationals, including Medellin. Id. at ¶¶ 153(4) and (5). The ICJ found that the appropriate remedy for the violations found "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [covered] Mexican nationals, * * * by taking account * * * both of the violation of the rights set forth in Article 36 * * * and of paragraphs 138 to 141 of this Judgment." Id. at ¶ 153(9).

In the referenced paragraphs, the ICJ specified that it "considers that it is the judicial process that is suited to this task [of review and reconsideration]." Id. at ¶ 140. The ICJ elsewhere made clear that it did not prescribe a particular outcome for the review and reconsideration, but instead specified that it was for the United States to determine in each case whether the violation of Article 36 "caused actual prejudice to the defendant in the process of administration of criminal justice." Id. at ¶ 121. The ICJ added that "[i]t is not to be presumed * * * that partial or total annulment of conviction or sentence provides the necessary or sole remedy" for the found violations of the treaty. Id. at ¶ 123. At the same time, the ICJ made clear that the prejudice inquiry must give "full weight to violation of the rights set forth in the Vienna Convention," and must be separate from an inquiry whether the defendant experienced harm cognizable as a violation of due process under the United States Constitution. Id. at ¶ 139. Finally, the ICJ stated that the application of domestic procedural default rules "may continue to prevent courts from attaching legal significance" to violations of Article 36(1)'s consular notification and

assistance provisions. Id. at ¶113. If so applied, the ICJ stated that procedural default rules would violate Article 36(2) by "preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended.'" Ibid.

5. The Supreme Court's Action and the President's Determination. After the Fifth Circuit denied a certificate of appealability that would permit further review of Medellin's Vienna Convention claim, the Supreme Court granted certiorari to consider whether courts within the United States were required to apply the ICJ's *Avena* decision when invoked by an covered Mexican national, or alternatively, whether *Avena* should be given effect in the interests of international comity and uniform treaty interpretation. On February 28, 2005, during the course of the Supreme Court litigation, the President determined that "the United States will discharge its international obligations" under the *Avena* decision. Addendum A-3. In relevant part, the President declared:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States, that the United States will discharge its international obligations under the decision of the International Court of Justice in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Avena)*, 2004 I.C.J. 128 (Mar. 31), by having state courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

Ibid. The Attorney General thereafter sent letters to the various state attorneys general, including Attorney General Abbott of Texas, informing them of the President's determination and its implications. Addendum 1-2. In addition, also during the pendency of the Supreme Court litigation, Medellin filed the instant application in this Court for

successive state habeas corpus review.

Because of these developments, and because of the existence of threshold procedural barriers that could foreclose the availability of federal habeas corpus relief and thereby render consideration of the questions presented academic, the Supreme Court dismissed the writ of certiorari as improvidently granted. *Medellin v. Dretke*, 125 S. Ct. 2088, 2090 (2005) (per curiam). In so doing, the Supreme Court specifically noted that the instant "state-court proceeding may provide Medellin with the very reconsideration of his Vienna Convention claim that he now seeks." Id. at 2089.

SUMMARY OF ARGUMENT

I. This Court should permit consideration on the merits of the Vienna Convention claim raised in applicant Medellin's successive application for state habeas corpus relief to the extent that his claim relies on the President's determination that "review and reconsideration" of Medellin's convictions and sentences by Texas courts is necessary for compliance with the United States' international obligations. Under the terms of the United Nations Charter, to which the United States is a party, each member State "undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." U. N. Charter, Art. 94(1). The phrase "undertakes to comply" does not mean that an ICJ decision will be given immediate effect in the domestic courts of a member State, but instead represents a commitment by a member State to take appropriate action to comply with an ICJ decision. The United Nations Charter

recognizes that there may be situations in which a member State may not comply with an ICJ decision, in which case, under the Charter, the matter is referable to the Security Council – not the domestic courts of the member State – for resolution.

In this case, the President, as the nation's representative in foreign affairs, has determined that the United States will comply with the ICJ's decision in *Avena*. Compliance serves to protect the interests of United States citizens abroad, promotes the effective conduct of foreign relations, and underscores the United States' commitment in the international community to the rule of law. Accordingly, in the exercise of his constitutionally based foreign affairs powers and his authority under the United Nations Participation Act and by virtue of the United States' ratification of the United Nations Charter, the President has determined that compliance should be achieved by having state courts give effect to the *Avena* decision in accordance with the principles of comity. That presidential determination, like an executive agreement, has independent legal force and effect, and contrary state rules must give way.

Under the President's determination, this Court must authorize review and reconsideration of Medellin's convictions and sentences, without regard to state law doctrines of procedural default, and determine whether the Vienna Convention violation that occurred in this case – independently of any constitutional claim – caused actual prejudice at either the guilt or penalty phases of Medellin's trial. The President's determination requires only review and reconsideration of Medellin's Vienna Convention

claim as specified in *Avena*; like the *Avena* decision itself, it does not dictate any particular outcome. Thus, this Court is not obligated to grant relief on the merits unless Medellin makes an affirmative, non-speculative showing that the fairness of either his trial or sentencing hearing was actually compromised by the Vienna Convention violation.

II. By contrast, standing alone, neither the *Avena* decision itself nor the Vienna Convention that it interprets is privately enforceable in American courts by detained foreign nationals. The language, structure, purpose, and ratification history of the Vienna Convention reveal that it was not intended to be privately enforceable. The ICJ's *Avena* decision does not, by itself, give Medellin greater rights. In Article 94, the United Nations Charter imposes an international duty on the United States to comply with an ICJ decision, while providing that instances of non-compliance with ICJ decisions are subject to redress in the Security Council. These provisions, together with the history of the United States' ratification of the United Nations Charter, demonstrate that insofar as the United States is concerned, enforcement of an ICJ decision is committed to the political branches of the federal government. The ICJ decision does not provide a free-standing source of law on which a private party may rely in domestic judicial proceedings.

III. Article 11.071, Section 5, of the Texas Code of Criminal Procedures imposes limitations on the ability of this Court to consider claims raised in a "subsequent application" for state habeas corpus relief. Those limitations are implicated here, as

Medellin previously filed an application for state habeas relief. The construction to be given Section 5 is a question of state law. If Section 5 should be construed to permit "consideration on the merits" of Medellin's Vienna Convention claim in light of the previously unavailable presidential determination that the *Avena* decision should be given effect in state courts, the consideration of Medellin's Vienna Convention claim permitted under Section 5 would coincide with the requirement imposed by the President's determination that this Court give effect to the ICJ's *Avena* decision by providing "review and reconsideration" of Medellin's Vienna Convention claim. By contrast, should this Court interpret Section 5 in such a manner that precludes consideration of Medellin's Vienna Convention claim, Section 5 would contravene the President's implementation of treaty obligations, and federal law would preempt its operation in the circumstances of this case. Under either view, Medellin is entitled to review and reconsideration in light of the President's determination. But regardless of how this Court construes Section 5, Medellin's reliance on the *Avena* decision itself as an independent intervening development is misplaced, because the *Avena* decision, by itself, provides no private rights that are immediately enforceable in United States courts.

ARGUMENT

I. THIS COURT MUST PERMIT REVIEW AND RECONSIDERATION OF APPLICANT MEDELLIN'S VIENNA CONVENTION CLAIM

The President has determined that state courts are to give effect to the ICJ's *Avena* decision in cases filed by the 51 Mexican nationals addressed in that decision. In this

case, that Presidential determination requires this Court to provide review and reconsideration of Medellin's Vienna Convention claim without regard to the doctrine of procedural default or other state law obstacles. By contrast, the *Avena* decision, standing alone, does not provide a source of law on which Medellin can rely in these proceedings. Medellin's subsequent application for habeas relief should be disposed of in light of those principles.

A. The United States Has An International Legal Obligation To Comply With *Avena* Under The United Nations Charter

The ICJ is an international judicial body created by the United Nations Charter and the Statute of the International Court of Justice. 59 Stat. 1031, 1055 (1945). As the "principal judicial organ of the United Nations" (United Nations Charter, Art. 92, 59 Stat. 1051), the ICJ adjudicates disputes between States that are parties to the United Nations Charter and that have accepted its jurisdiction for purposes of the dispute. Under the Charter, States may resort to the United Nations Security Council – not to the domestic courts of a State that does not comply with an ICJ judgment – to enforce compliance with ICJ judgments. As noted above, the United States became a party to the Vienna Convention on Consular Relations in 1969. In addition, in 1969, the United States became a party to an Optional Protocol to the Vienna Convention that provides that "disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning Compulsory Settlement of Disputes, Art. I, 21 U.S.T. 326, 596 U.N.T.S. 488.

Any party to the Optional Protocol may brings such suits before the International Court of Justice against another State party to the Optional Protocol.[1]

Article 36 of the Vienna Convention, which addresses consular notification, access, and assistance, does not provide foreign nationals with a judicially enforceable right that can be asserted to challenge a domestic criminal judgment. This Court has already held as much in accepting the state habeas court's determination that Medellin, as a private individual, lacked standing to seek judicial redress for a violation of Article 36's consular notification provisions. See *Ex parte Medellin*, No. 50,191-01 (Tex. Cr. App. 2001) , reviewing Cause No. 675430-A (339th Dist. Ct. 2001). The Fifth Circuit has reached this same conclusion as well. See *United States v. Jimenez-Nava*, 243 F.3d 192, 197 (5th Cir. 2001). For reasons elaborated on later (infra, pp. 34-42), Article 36 therefore cannot justify any claim that an ICJ decision interpreting that provision is, standing alone, entitled to be privately enforced in domestic courts. Nor can the Optional Protocol, which merely operates as a grant of "jurisdiction" to the ICJ over suits brought by other States that are party to the Optional Protocol. The Optional Protocol does not itself commit the United States to comply with a resulting ICJ decision, much less make

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[1] On March 7, 2005, the United States noticed its withdrawal from the Optional Protocol. See Addendum A-2 (letter of Attorney General Gonzales, dated April 5, 2005). As a consequence, the United States will no longer recognize the jurisdiction of the ICJ to resolve disputes concerning the interpretation and application of the Vienna Convention. The United States' withdrawal from the Optional Protocol does not affect either the international legal obligation of the United States to comply with the *Avena* decision or the efficacy of the President's determination concerning the means of compliance. Ibid.

such a decision privately enforceable in a criminal proceeding by a foreign national.

The source of the United States' obligation to comply with ICJ decisions is instead found in Article 94(1) of the United Nations Charter, which is itself a treaty. 59 Stat. 1051. Article 94(1) provides that "[e]ach member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which is a party." Ibid.[2] Article 94(2) further provides that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." Ibid. Taken together, Article 94's provisions make clear that, as a party to the *Avena* litigation, the United States has an international obligation to comply with the ICJ's decision in the case. Those provisions further make clear that non-compliance may result in the other party seeking recourse before the Security Council. No provision requires, however, that ICJ decisions be treated as binding law in the domestic courts of party States.

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[2] In describing the international law obligation it imposes, Article 94(1) refers to compliance with the "decision" of the ICJ. The decision does not have force as legal precedent. See ICJ Statute Art. 59 ("The decision of the [ICJ] has no binding force except between the parties and in respect of that particular case."). This brief uses the term "decision" to refer to the portion of the ICJ ruling with which the United States has an international obligation to comply - what in United States practice would be called the judgment. The United States does not have an international obligation to acquiesce in or follow the legal reasoning of the opinion.

B. As The Nation's Chief Foreign Policy Officer, The President Had The Authority To Determine That The *Avena* Decision Should Be Enforced In State Courts In Accordance With Principles Of Comity, And That Determination Must Be Honored By This Court

In *Avena*, the ICJ found that the United States had violated the Vienna Convention by not informing 51 Mexican nationals of their rights under Article 36(1)(b) and by not notifying consular authorities of the detention of 49 Mexican nationals, and that it had deprived Mexico of its rights under Article 36(1)(a) and (c) to have access to its nationals and to arrange for legal representation. *Avena*, at ¶ 153(4), (5), (6), and (7). Medellin's case was covered by each of those rulings. The ICJ found that the appropriate remedy "consists in the obligation of the United States of America to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [covered] Mexican nationals, * * * by taking account both of the violation of the rights set forth in Article 36 * * * and of paragraphs 138 to 141 of this Judgment." Id. at ¶ 153(9). In paragraphs 138 to 141, the ICJ stated that it considered the "judicial process" the suitable forum for providing review and reconsideration; that review and reconsideration should "guarantee that the violation and the possible prejudice caused by that violation will be fully examined and taken into account"; and that the domestic courts conducting review and reconsideration ascertain "whether in each case the violation of Article 36 committed by the competent authorities caused actual prejudice to the defendant in the process of administration of criminal justice."

The Executive Branch interprets the decision to place the United States under an

international obligation to choose a means for the covered 51 individuals to receive review and reconsideration of their convictions and sentences to determine whether the denial of the Article 36 rights identified by the ICJ caused actual prejudice to the defense either at trial or at sentencing. The President has determined that the United States will discharge its international obligations under *Avena* by providing review and reconsideration in state courts.

1. The President is "the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936). The President, through subordinate Executive Branch officials, represents the United States in the United Nations, including before the ICJ and in the Security Council. See 22 U.S.C. 287 (authorizing the President to appoint persons to represent the United States in the United Nations); 22 U.S.C. 287a (persons appointed under Section 287 shall, "at all times, act in accordance with the instructions of the President"). Congress, in enacting the United Nations Participation Act, also expressly anticipated that these officials would – beyond representing the United States – perform "other functions in connection with the participation of the United States in the United Nations" at the direction of the President or his representative to the United Nations. 22 U.S.C. 287(a), (b). In addition, the President enjoys "a degree of independent authority to act" in "foreign affairs." *American Ins. Assoc. v. Garamendi*, 539 U.S. 396, 414 (2003). Against those background understandings, the United States' ratification of the United Nations

Charter, including its Article 94, implicitly grants the President "the lead role" in determining how to respond to an ICJ decision. Cf. id. at 415 (the "President has the lead role * * * in foreign policy"); see also *First Nat'l City Bank v. Banco Nacional de Cuba*, 460 U.S. 759, 767 (1972) (plurality opinion).

In particular circumstances, the President may decide that the United States will not comply with an ICJ decision and, if Security Council enforcement measures are proposed, direct a veto, consistent with the United Nations Charter.[3] Here, however, the President has determined that the foreign policy interests of the United States in meeting its international obligations and in protecting Americans abroad justify compliance with the ICJ's decision.

Once the President determines to comply with an ICJ decision, the President must then consider the most appropriate means of compliance. In this instance, in light of the paramount interest of the United States in prompt compliance with the ICJ's decision with respect to the 51 named individuals, and the suitability of judicial review as a means of compliance, the President has determined that "the United States will discharge its

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[3] That was the case with respect to the ICJ's ruling in *Nicaragua v. United States*, 1986 I.C.J. Rep. 14, 146, 25 I.L.M. 1337 (1986) in which the ICJ ruled that the United States was obligated to cease certain activities in Nicaragua and to make reparation to that country for injuries purportedly caused by breaches of customary international law. The United States, which had withdrawn its submission to the ICJ's jurisdiction and withdrawn from proceedings before the ICJ, refused to recognize the validity of the ICJ's decision, did not pay reparation to Nicaragua, and subsequently vetoed a United Nations Security Council resolution calling for it to comply with the ICJ's judgment. United Nations Security Council: Excerpts from Verbatim Records Discussing I.C.J. Judgment in Nicaragua v. United States, 25 I.L.M. 1337, 1352, 1363 (1986).

international obligations * * * by having state courts give effect to the [*Avena*] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." Addendum A-3 (Memorandum for the Attorney General, dated Feb. 28, 2005). Under that determination, as one of the 51 covered Mexican nationals, Medellin is entitled to seek "review and reconsideration" of his convictions and sentences in light of the decision of the ICJ in *Avena*, and this Court is required to give effect to the *Avena* decision by providing such review and reconsideration, without regard for state procedural bars that might otherwise prevent consideration of Medellin's Vienna Convention claim on its merits. Because compliance with the ICJ's decision can be achieved through judicial process, and because there is a pressing need for expeditious compliance with that decision, the President exercised his constitutional foreign affairs authority and his authority to direct the performance of United States functions in the United Nations to establish that binding federal rule without the need for implementing legislation. Cf. *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Sanitary Dist. v. United States*, 266 U.S. 405 (1925). The constitutionally based authority of the President to determine the means by which the United States will implement its international legal obligations has special force as applied to the treatment of aliens in the United States, which is a matter of paramount federal concern and has long been regulated by treaty.[4] A

[4] The Department of State's guidance to federal, state, and local law enforcement and other officials on compliance with consular notification and access requirements lists numerous such treaties to which the United States is a party, some dating back to the first half of the 19th Century. See Consular Notification and Access, at 51-57 (1998),

state's application of its criminal law to aliens thus raises concerns that fall uniquely within the scope of federal responsibilities. The President's authority is especially important in the context of a treaty, like the Vienna Convention, that not only protects foreign nationals in this country, but also protects Americans overseas. Under the Constitution, it is the President who - through diplomatic, consular, and other means - protects Americans deprived of liberty abroad. In deciding what actions the United States will take to implement its Vienna Convention obligations and to address the ICJ decision in *Avena*, the President must make delicate and complex calculations - for which he is uniquely suited - taking into account the need for the United States to be able to enforce its laws effectively against foreign nationals in the United States, the need for the United States to be able to protect Americans abroad, the international legal obligations of the United States, judgments about the likely responses of various foreign countries to potential United States actions with respect to the Vienna Convention, and other United States foreign policy interests.

To the extent that state procedural rules would prevent giving effect to the President's determination that the *Avena* decision should be enforced in accordance with principles of comity, those rules must give way. Executive action that is undertaken pursuant to the President's authority under Article II of the Constitution; connected to the President's role in the ICJ by virtue of the United States' ratification of the United

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<http://www.travel.state.gov/law/consular/consular_744.html>.

Nations Charter; and authorized by the President's power to direct the performance of functions related to the United Nations, see 22 U.S.C. 287, constitutes "the supreme Law of the Land," U.S. Const. Art. VI, Cl. 2, and represents preemptive federal authority, see *United States v. Belmont*, 301 U.S. 324, 331 (1937).[5]

Under the President's determination, this Court is not required to reach any particular outcome, but is instead to evaluate whether the violation of Article 36, independent of any constitutional claim, "caused actual prejudice to [Medellin] in the process of administration of criminal justice," *Avena*, ¶ 121, bearing in mind that "speculative * * * claims of prejudice," *Breard*, 523 U.S. at 377, do not warrant relief. If prejudice were found, a new trial or a new sentencing hearing would be ordered. In contrast, if after providing review and reconsideration, this Court were to conclude that Medellin has failed to demonstrate, in a non-speculative manner, that the Vienna Convention violation – considered on its own merits, independently of any constitutional issues – resulted in "actual prejudice" at either the guilt or penalty phases of his trial, it

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[5] As the Court explained in *Belmont*:

> Plainly, the external powers of the United States are to be exercised without regard to state laws or policies * * *. And while this rule in respect of treaties is established by the express language of cl. 2, Art. VI, of the Constitution, the same rule would result in the case of all international compacts and agreements from the very fact that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states * * *. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear.

301 U.S. at 331.

may deny relief without violating the President's determination or compromising the United States' international legal obligations to comply with the ICJ's *Avena* decision.[6]

2. The President's authority to issue his determination rests not only on his authority to determine how the United States will respond to an ICJ decision, but also on the President's authority under Article II of the Constitution to manage foreign affairs. "Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historic gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.' " *American Ins. Assoc. v. Garamendi*, 539 U.S. at 414 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-611 (1952) (Frankfurter, J.,

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[6] In *Avena*, the ICJ was careful not to specify remedies or direct results. The ICJ thus stated that it was "not to be presumed * * * that the partial or total annulment of conviction or sentence provides the necessary or sole" remedy for the Article 36 violations that it found. *Avena*, at ¶ 123. The ICJ further cautioned that its decision did not – as Mexico unsuccessfully urged – mandate imposition of the domestic exclusionary rule in the case of Article 36 violations. Id. at ¶ 127. In considering Vienna Convention claims, the federal courts of appeals have uniformly concluded that Article 36 violations, if cognizable at all, may not be remedied through the exclusion of constitutionally obtained evidence or the dismissal of charges. See, *e.g.*, *United States v. Gamez*, 301 F.3d 1138, 1143-1144 (9th Cir. 2002); *United States v. Duarte-Acero*, 296 F.3d 1277, 1281-1282 (11th Cir. 2002); *United States v. Felix-Felix*, 275 F.3d 627, 635 (7th Cir. 2001) (collecting cases); *United States v. De La Pava*, 268 F.3d 157, 163-165 (2nd Cir. 2001); *United States v. Minjares-Alvarez*, 264 F.3d 980, 986-988 (10th Cir. 2001); *United States v. Page*, 232 F.3d 536, 541 (6th Cir. 2000); *United States v. Chaparro-Alcantara*, 226 F.3d 616, 622 (7th Cir. 2000); *United States v. Cordoba-Mosquera*, 212 F.3d 1194, 1196 (11th Cir. 2000); *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885-888 (9th Cir. 2000) (en banc); *United States v. Li*, 206 F.3d 56, 60-66 (1st Cir. 2000) (en banc). The President's determination would not bar this Court from reaching the same conclusion.

concurring)). In the field of foreign relations, "the President has a degree of independent authority to act." *Garamendi*, 539 U.S. at 414. The President's Article II power over foreign affairs "does not require as a basis for its exercise an act of Congress." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); see *Sanitary Dist.*, 266 U.S. at 425-426 (authority of the Attorney General to bring an action in court to secure compliance with a treaty does not require legislation).[7]

Consistent with that understanding, the Supreme Court has repeatedly held that the President has authority to make executive agreements with other countries to settle claims without ratification by the Senate or approval by Congress. *Garamendi*, 539 U.S. at 415; *Dames & Moore v. Regan*, 453 U.S. at 679, 682- 683; *United States v. Pink*, 315 U.S. 203, 223 (1942); *United States v. Belmont*, 301 U.S. at 330-331. The Supreme Court has also held that such agreements preempt conflicting state law. *Garamendi*, 539 U.S. at 416-417, 424 n.14; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 301 U.S. at 327, 331. As the Court has explained, "[t]here is, of course, no question that at some point an exercise of state

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[7] Recognition of a similar independent Executive authority is reflected in the Court's holdings that the judiciary had a "duty" to give effect to the Executive's suggestion of a foreign sovereign's immunity. See, *e.g.*, *Compania Espanola de Navegacion Maritima v. The Navemar*, 303 U.S. 68, 74 (1938) ("If the claim is recognized and allowed by the executive branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his direction."); *Ex parte Republic of Peru*, 318 U.S. 578, 587-589 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place. * * * Nor is there any question that there is executive authority to decide what that policy should be." *Garamendi*, 539 U.S. at 413-414 (internal citations omitted).

That the President's action under his foreign relations power has domestic legal consequences does not detract from the President's power to act. To the contrary, as the cases cited above illustrate, the foreign policy-effectuating agreements upheld by the Supreme Court have often displaced domestic legal rules on matters of significant state concern. For example, in *Garamendi*, the Court enjoined enforcement of an otherwise valid state statute that interfered with an international agreement reached by the President to resolve Holocaust-era claims. And, in *Dames & Moore*, the Court upheld a Presidential order suspending claims pending in American courts in order to effectuate the terms of an executive agreement resolving claims between the United States and Iran. In finding these actions to be within the ambit of the President's foreign affairs powers, the Court relied on both the consistent congressional acquiescence throughout our nation's history in the exercise of Executive authority to resolve international claims *and* the absence of any congressional disapproval of the particular agreements reached in either of those cases. See *Garamendi*, 539 U.S. at 415, 429; *Dames & Moore*, 453 U.S. at 678-680, 687-688.

Assessed against a historical background of congressional acquiescence, the President's authority to suspend pending legal claims pursuant to an executive order in *Dames & Moore* was "treated as a gloss on 'Executive Power' vested in the President" by Article II of the Constitution. *Dames & Moore*, 453 U.S. at 686.

The resolution of the present dispute with Mexico that has resulted in adversarial proceedings before the ICJ is of no less concern to United States' foreign policy interests than the disputes at issue in those cases. "[T]he President possesses considerable independent constitutional authority to act on behalf of the United States on international issues," *Garamendi*, 539 U.S. at 424 n. 14, and that authority was near its zenith here. With the advice and consent of the Senate, the United States ratified both the United Nations Charter, under which the United States has obligated itself to comply with ICJ decisions, and the Optional Protocol, under which the United States has agreed to submit to the ICJ's jurisdiction in disputes arising under the Vienna Convention. The President is charged both constitutionally and under the United Nations Participation Act, 22 U.S.C. 287, 287a, with directing all functions connected with the participation of the United States in the United Nations, including the ICJ. The President's constitutional, statutory, and treaty-based authority in these respects necessarily "includes the power to determine the policy" of the United States concerning compliance with ICJ decisions. Cf. *Pink*, 315 U.S. at 229; see also *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 381 (2000) ("Congress's express command to the President to take the initiative for the United States

among the international community invested him with the maximum authority of the National Government."). Indeed, "[u]nless such a power exists," the President's constitutional authority to represent the United States in these international bodies "might be thwarted or seriously diluted." *Pink*, 315 U.S. at 229-230.

In comparison to the "executive agreement" cases, the means chosen by the President to comply with the United States' international obligations under Article 94 and to resolve its dispute with Mexico over Vienna Convention violations involve only a modest intrusion on state functions. Unlike the suspension of pending court cases in *Dames & Moore*, the instant Presidential determination does not divest this Court of jurisdiction to dispose of Medellin's claim, nor does it direct this Court to reach a particular result. It requires only that this Court take account of the Vienna Convention violations by state officials by conducting a prejudice inquiry that is not wholly dissimilar from the prejudice inquiries that this Court routinely conducts in criminal cases. And by charging state courts with the responsibility of conducting the required "review and reconsideration," the President's determination respects principles of federal-state comity, under which the responsibility in state cases for record development and fact-finding – including prejudice assessments – is customarily left for the state courts in the first instance. Cf. 28 U.S.C. 2254(e). The limited intrusion into state practice, under the President's determination, is fully justified to enable review of the State's own violation of treaty rights in the treatment of an alien defendant. Federal Executive authority would be

frustrated, and "serious [international] consequences" would result if Texas laws limiting the availability of habeas relief were allowed to "defeat or alter our foreign policy," as determined by the President. *Pink*, 315 U.S. at 232.

Just as the President may enter into an executive agreement to resolve a dispute with a foreign government, the President is equally free to resolve a dispute with a foreign government by determining how the United States will comply with a decision reached after the completion of formal dispute-resolution procedures with that foreign government. To require the President to enter into yet another formal bilateral agreement in order to exercise his power "would hamstring the President in settling international controversies" and weaken this nation's ability to fulfill its treaty obligations. *Garamendi*, 539 U.S. at 416. Such a limitation would fail to recognize the practical reality that there are occasions when a foreign government may acquiesce in a resolution that it is unwilling to formally approve. It would also fail to recognize that obtaining a formal agreement can be a time-consuming process that is ill-suited for occasions when swift action is required. And it would have the perverse effect of assigning to a foreign government veto power over the President's exercise of his authority over foreign affairs – in this case, over the President's choice of the means by which the United States will comply with its international obligations under *Avena*.

3. As explained above, the President's determination is that the *Avena* decision is to be enforced in accordance with principles of comity. Accordingly, this Court is not free to

reexamine whether the ICJ correctly determined the facts or correctly interpreted the Vienna Convention. Under principles of comity, "the merits of the case should not * * * be tried afresh, as on a new trial or an appeal, upon the mere assertion * * * that the judgment was erroneous in law or in fact." *Hilton v. Guyot*, 159 U.S. 113, 203 (1895). When principles of comity apply, a foreign judgment is given effect without reexamination of the merits of the decision, provided that the court rendering the judgment had jurisdiction, the court was impartial, its procedures satisfied due process, and there is no "special reason why the comity of this nation should not allow it full effect." Id. at 202; see also *Medellin v. Dretke*, 125 S. Ct. at 2094 (Ginsburg, J, concurring) ("It is the long-recognized general rule that, when a judgment binds or is respected as a matter of comity, a 'let's see if we agree' approach is out of order."). The President's determination that the ICJ decision is entitled to comity is consistent with those principles.

Further, under the ICJ Statute, ICJ decisions are binding only "between the parties" and "in respect of that particular case." 59 Stat. 1062. The ICJ's decision in *Avena* found violations of the Vienna Convention with respect to 51 specific individuals, including Medellin. The President's determination that judicial review and reconsideration should be afforded in this nation's courts applies only to the 51 individuals whose rights were determined in the *Avena* case. The scope of the President's determination is thus consistent with the scope of the ICJ's decision with respect to each of the individual cases before it.

The President's determination that domestic courts should provide review and reconsideration under the ICJ's decision, without prejudice to the judiciary's power to consider afresh in other cases the underlying treaty-interpretation and application issues subsumed in the ICJ's rulings, accords with general standards for determining when judgments against the United States are binding in subsequent litigation. Under domestic law, when a party has obtained a final judgment against the United States, that judgment is binding in subsequent litigation between the United States and that party. The United States is not free to relitigate the merits of the particular dispute. See *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984); *Montana v. United States*, 440 U.S. 147 (1979). In contrast, a judgment against the United States obtained by one party does not preclude the United States from relitigating the underlying merits of particular legal theories in actions brought by or against other parties. See *United States v. Mendoza*, 464 U.S. 154 (1984). Analogous principles here justify the President's decision to give effect to the final decision of the ICJ with respect to the 51 named individuals whose rights under the Vienna Convention were found to be violated, while leaving the government and the courts free to address the underlying merits in other cases.

5. Because of the President's exercise of authority, this Court is required to review and reconsider Medellin's capital convictions and death sentences to determine whether the violations identified by the ICJ caused actual prejudice to the defense at trial or at sentencing, bearing in mind that speculative showings of prejudice are insufficient.

Breard, 523 U.S. at 377. If actual prejudice were found, a new trial, a new sentencing, or other appropriate relief would be warranted. This Court may not interpose procedural default or other procedural bars to prevent review and reconsideration, as reliance on such procedural doctrines in this case would impermissibly "frustrate the operation of the particular mechanism the President has chosen" to comply with the United States' international legal obligations. *Garamen*di, 539 U.S. at 424.

The holding in *Breard*, 523 U.S. at 375, that the Vienna Convention does not prevent application of procedural default rules to a Vienna Convention claim, is not inconsistent with this conclusion. The President's determination, which means that procedural default rules may not prevent review and reconsideration for the 51 Mexican nationals identified in *Avena*, is not premised on a different interpretation of the Vienna Convention than that adopted in *Breard*. As the Supreme Court stated in *Breard*, not only is it an established principle of international law that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of [a] treaty," but the specific language in Article 36 "that the rights expressed in the [Vienna] Convention itself 'shall be exercised in conformity with the laws and regulations of the receiving State,'" meant that domestic rules of procedural default are applicable to claims raised under the Vienna Convention. Ibid. The United States regards the Court's holding in *Breard* as correct and controlling on that issue. Nonetheless, the President has determined that the foreign policy interests of the United States in meeting its international

obligations and protecting Americans abroad require the ICJ's decision to be enforced without regard to the merits of the ICJ's interpretation of the Vienna Convention. Just as *Breard* would not stand in the way of legislation that provided for the implementation of the *Avena* decision, it does not stand in the way of the President's determination that the *Avena* decision should be given effect.

II. ABSENT THE PRESIDENT'S DETERMINATION, NEITHER ARTICLE 36 OF THE VIENNA CONVENTION NOR THE ICJ'S *AVENA* DECISION IS PRIVATELY ENFORCEABLE BY APPLICANT MEDELLIN TO CHALLENGE HIS CONVICTION OR SENTENCE

In addition to his proper reliance on the President's determination, applicant Medellin contends (Br. 36) that, "[b]ecause the rights conferred by the Vienna Convention are self-executing, and because the United States agreed to submit to binding resolution by the ICJ of disputes concerning the interpretation and application of the Vienna Convention, the *Avena* judgment provides the 'rule of decision' in [his] case without the need for any further executive or legislative action." That is, independent of the President's determination that the United States will comply with the international obligation imposed by Article 94 of the United Nations Charter, Medellin argues this Court must give effect to the *Avena* decision by providing "review and reconsideration" of his otherwise procedurally defaulted Vienna Convention claim. This Court need not reach or resolve these issues if it agrees that the President's determination itself provides sufficient basis for this Court to provide review and reconsideration. If this Court does reach these arguments, however, it should conclude that neither Article 36 nor *Avena* gives

a foreign national a private, judicially enforceable right to attack his conviction or sentence.

A. Article 36 Does Not Authorize Private Judicial Enforcement

1. The Supremacy Clause provides that "all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Nonetheless, treaties are negotiated by this country against the background understanding that they do not generally create judicially enforceable individual rights. In general, "[a] treaty is primarily a compact between independent nations," and "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Head Money Cases*, 112 U.S. 580, 598 (1884). When a treaty violation nonetheless occurs, it "becomes the subject of international negotiations and reclamation," not judicial redress. Ibid. See *Charlton v. Kelly*, 229 U.S. 447, 474 (1913); *Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided.").

Treaties can create judicially enforceable private rights, but since such treaties are the exception, rather than the rule, there is a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts. *United States v. Emuegbunam*, 268 F.3d 377, 389-390 (6th Cir. 2001); *United States v. Jimenez-Nava*, 243 F.3d at 195-196; *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *United*

States v. Li, 206 F.3d 56, 61 (1st Cir. 2000) (en banc).

That background principle applies even when a treaty benefits private individuals. "International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Restatement (Third) of the Foreign Relations Law of the United States,* § 907 cmt. a, at 395 (1987) (*Restatement (Third) of Foreign Relations*). For example, in *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 442 & n.10 (1989), the Court held that two conventions did not create judicially enforceable rights for ship owners, even though one specified that a merchant ship "shall be compensated for any loss or damage" in certain circumstances, and the other specified that "[a] belligerent shall indemnify the damage caused by its violation." The Court explained that the conventions "only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs." Id. at 442. "They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." Ibid. See *Johnson v. Eisentrager*, 339 U.S. 769, 789 & n.14 (1950) (protections of the Geneva Convention of July 27, 1929, 47 Stat. 2021, are not judicially enforceable).

2. Article 36(1)(b) of the Vienna Convention specifies that "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested." 21 U.S.T. at 101. In addition, "[a]ny communication addressed to the consular post by the

person arrested, * * * shall also be forwarded * * * without delay." Ibid. Finally, state authorities "shall inform the person concerned without delay of his rights under [Article 36(1)(b)]." Ibid.

Nothing in the Vienna Convention provides that the "rights" specified in Article 36(1)(b) may be privately enforced in a criminal proceeding. See *United States v. Jimenez-Nava*, 243 F.3d at 197. Accordingly, consistent with background principles, the State of the foreign national may protest the failure to observe the terms of Article 36 and attempt to negotiate a solution. And if both parties have subscribed to the Optional Protocol, a resolution may be sought from the ICJ. But a foreign national does not have an independent private right to seek to have his conviction or sentence overturned.[8]

Other Vienna Convention clauses reinforce that conclusion. The Vienna Convention's preamble states that "the purpose of [the] privileges and immunities [created by the treaty] is not to benefit individuals, but to ensure the efficient performance of

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[8] By its language, purpose, and drafters' intent, the Vienna Convention is thus fundamentally different from the extradition treaty, with its specialty provision, that was found to confer individually enforceable rights in *United States v. Rauscher*, 119 U.S. 407, 419-424 (1886). As the Supreme Court later explained, the rule of specialty applied by the Court in *Rauscher* had been "implied * * * in the Webster-Ashburton Treaty [on extradition] because of the practice of nations with regard to extradition treaties," and that "any doubt" concerning a fugitive's ability to seek judicial enforcement of the treaty-conferred rule of specialty "was put to rest by two federal statutes which imposed the doctrine of specialty upon extradition treaties to which the United States was a party." *United States v. Alvarez-Machain*, 504 U.S. 655, 660, 667 (1992). There is no comparable background practice among nations to allow breaches of consular notification requirements to support challenges to criminal convictions and sentences, and, unlike the extradition treaty at issue in *Rauscher*, Article 36's requirements have never been implemented through congressional legislation.

functions by consular posts." 21 U.S.T. at 79. And the introductory clause to Article 36 states that it was designed "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State." Those clauses show that "the purpose of Article 36 was to protect a state's right to care for its nationals." *De La Pava*, 268 F.3d at 165.

The structure of Article 36 confirms that understanding. The first protection extended is to consular officers, not to individual nationals: Article 36(1)(a) specifies that "consular officers shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of foreign nationals are placed underneath, signaling what the introductory clause spells out - that the function of Article 36(1)(b) is not to create freestanding individual rights but to facilitate a foreign state's right to protect its nationals. Moreover, on a practical level, a foreign national's rights are necessarily subordinate to, and derivative of, his States's rights. An individual may ask for consular assistance, but it is entirely up to the foreign government whether to provide it. That State may choose to enter into the Optional Protocol, providing an enforcement mechanism in the form of a suit by the offended State in the ICJ, underscores that the Vienna Convention confers rights on, and envisions enforcement by, States, not individuals.

3. The ratification history provides further evidence that Article 36 does not create private rights that may be enforced in a criminal proceeding. See *United States v. Stuart*, 489 U.S. 353, 366 (1989) (ratification history is relevant in interpreting treaty). The State Department informed the Senate that "[t]he Vienna Convention does not have the effect of

overcoming Federal or State laws beyond the scope long authorized in existing consular conventions." S. Exec. Rep. No. 9, 91st Cong., 1st Sess. 18 (1969). The Senate Foreign Relations Committee, in turn, cited as a factor in its endorsement of the treaty that "[t]he Convention does not change or affect present U.S. laws or practice." Id. at 2. And following ratification of the Vienna Convention, the State Department wrote a letter to all 50 governors explaining it would not require "significant departures from the existing practice within the several states of the United States." See *Li*, 206 F.3d at 64. Those statements would not have been made if the Convention were understood to have given a criminal defendant a private right to challenge his conviction and sentence on the ground that he was not informed as required by Article 36.

4. The Executive Branch's interpretation of Article 36 "is entitled to great weight." *Stuart*, 489 U.S. at 369 (quoting *Sumitomo Shojo Am. Inc. v. Avagliano*, 457 U.S. 176, 184-185 (1982)). The Executive Branch has never interpreted the Vienna Convention to give a foreign national a judicially enforceable right to challenge his conviction and sentence. To the contrary, the United States took the position that Article 36 did not authorize private judicial enforcement both in its Supreme Court brief in this case, Brief for the United States at 18-30, *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (No. 04-5928), and in its earlier brief in *Breard*, Brief for the United States at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 371 (1998) (No. 97-1390), and *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214). Moreover, the State Department endorsed that same

interpretation in answering questions propounded by the First Circuit in the *Li* case. See *Li*, 206 F.3d at 63 (noting the State Department's view that the Vienna Convention "do[es] not create individual rights at all, much less rights susceptible to the [judicial] remedies proposed by appellants").[9]

5. In sum, Article 36 does not give a foreign national a private right to challenge his conviction and sentence based on an alleged denial of consular assistance. See *Jimenez-Nava*, 243 F.3d at 195-198; *Emuegbunam*, 268 F.3d at 391-394 ("we hold that the Vienna Convention does not create a right for a detained foreign national * * * that the federal courts can enforce"); see also *De La Pava*, 268 F.3d at 163-165 (suggesting the same); *Li*, 206 F.3d at 66-68 (Selya, J., concurring).

6. The conclusion that individual defendants cannot rely on the Vienna Convention to attack their convictions is fully consistent with the accepted understanding that the Vienna Convention is self-executing. See S. Exec. Rep. No. 9, supra, at 5. The Vienna Convention is self-executing in the sense that, without any implementing legislation, government officials can provide foreign nationals with information concerning consular assistance and with access to consular officers and can give effect to provisions that were intended to be judicially enforced, such as those relating to the privileges and immunities

[9] The State Department's letter is available at U.S. Dep't of State, Digest of United States Practice in International Law 2000 (last visited Feb. 28, 2005) ch. 2, doc. no. 1, <http://www.state.gov/documents/organization/7111.doc>.

of consular officers themselves.[10] But it is an entirely separate question whether Article 36 gives a foreign national a private right to challenge his conviction and sentence on the ground that consular access was denied. *Restatement (Third) of Foreign Relations Law*, § 111 cmt. h ("whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies"). The available evidence shows that Article 36 does not confer such private rights.

The question whether a private individual has a judicially enforceable right is also distinct from the question whether the United States could seek judicial relief in the event that state officials failed to provide a foreign national access to consular officers as required by the Vienna Convention. Under longstanding principles, the government could sue to vindicate a treaty right in the event of its denial. See *Sanitary Dist. v. United States*, 266 U.S. 405, 425-426 (1925) (Holmes, J.) (United States has authority to sue "to carry out treaty obligations to a foreign power"; "The Attorney General by virtue of his office may bring [such a] proceeding and no statute is necessary to authorize the suit."). The inherent authority of the United States to bring an action stems from the constitutionally grounded primacy of the national government in the realm of foreign affairs and the need for the United States to be able to effectuate treaty obligations and speak with one voice in

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[10] See, *e.g.*, *Risk v. Halvorsen*, 936 F.2d 393, 397 (9th Cir. 1991) (finding consular officer immune under Vienna Convention Article 43(1), 21 U.S.T. at 104, because duties were consular functions); *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1515-1516 (9th Cir. 1987) (recognizing the enforceability of the consular immunity provision of the Convention, but finding that the criminal actions at issue did not qualify for immunity).

dealing with foreign nations. No similar principle confers a general right to enforce treaties on private individuals.

7. The principle that domestic courts should give "respectful consideration" to an international court's interpretation of a treaty, *Breard*, 523 U.S. at 375, does not lead to the conclusion that Article 36 affords an individual a right to challenge his conviction and sentence. In *LaGrand* and *Avena*, the ICJ concluded that "Article 36, paragraph 1, creates individual rights, which, by virtue of Article I of the Optional Protocol, may be invoked in this Court by the national State of the detained person." *LaGrand*, 2001 I.C.J. ¶ 77, at 493; *Avena*, ¶ 40. That passage does not state that Article 36 gives a foreign national a domestically enforceable private right. Instead, consistent with the position stated in this brief, it states only that, when there has been a denial of foreign national's Article 36 rights, a State may seek relief from the ICJ.

In *LaGrand*, the ICJ also concluded that, because the United States failed to inform the LaGrand brothers of their rights as required by Article 36(1), its later application of a procedural default rule to refuse to consider their claim of prejudice arising from that breach violated Article 36(2)'s requirement that the laws of the receiving State "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 2001 I.C.J. ¶ 91, at 497-498. That conclusion presupposes either that Article 36(1)'s reference to "rights," Article 36(2)'s "full effect" requirement, or the two together create an obligation for criminal courts to attach "legal significance" to a

violation of Article 36(1) in a criminal proceeding. See ibid.; *Avena*, ¶ 113. While the ICJ's understanding of the Convention's requirements is entitled to respectful consideration, it is ultimately within the authority of the Supreme Court to provide the definitive interpretation of the meaning of a federal treaty. See *Breard*, 523 U.S. at 375. The "respectful consideration" owed to an ICJ interpretation is also counterbalanced here by the fact that the Executive Branch, whose views on treaty interpretation are entitled to "great weight," has considered the ICJ's interpretation and determined that its own longstanding interpretation of the treaty is the correct one. Against this background, the correct reading of Article 36 is that it does not give Medellin a private right to challenge his convictions and sentences on the ground that Article 36 was breached.

B. The *Avena* Decision Is Not Privately Enforceable

Medellin contends that, standing alone, the *Avena* decision constitutes a binding rule of federal law that he may privately enforce in this Court. While the United States has an international obligation to comply with the decision of the ICJ in this case under Article 94 of the United Nations Charter, the text and background of Article 94 make clear that an ICJ decision is not, of its own force, a source of privately enforceable rights in court.

1. Article 94 states that a United Nations member "undertakes to comply" with an ICJ decision. The phrase "undertakes to comply" does not constitute a recognition that an ICJ decision will have immediate legal effect in the domestic courts of a member nation. Instead, it constitutes a commitment on the part of United Nations members to take action

to comply with an ICJ decision. Furthermore, because Article 94(1) does not detail the means of compliance with an ICJ decision, it necessarily contemplates that the political branches of member States would have discretion to choose how to comply. If an ICJ decision were subject to immediate private enforcement in the courts of member States it would strip the political branches of that discretion. Likewise, even if a State decides to comply with the decision in a particular case, it retains the option of protecting itself from further decisions based on the legal principles of that case by withdrawing from the Optional Protocol, as the United States has now done. Giving automatic effect to the reasoning of an ICJ decision – for example, by recognizing an individual right on the strength of the *Avena* decision – would rob the political branches of the discretion to limit the effect of a decision to those covered by the decision by withdrawing from the Optional Protocol.

2. Article 94(2) of the United Nations Charter confirms that the Charter does not make ICJ decisions privately enforceable in the courts of member States. It provides that "[i]f any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment." 59 Stat. 1051. Article 94(2) envisions that the political branches of a member State may choose not to comply with an ICJ decision, and provides, in that event, recourse to the Security Council is the sole

remedy. Private judicial enforcement in domestic courts is incompatible with that enforcement structure.

3. There is no relevant evidence in the ratification history of the United National Charter that ICJ decisions would be judicially enforceable. Instead, the understanding was that ICJ decisions would be subject to enforcement by the Security Council. The Executive Branch expressed that view during consideration of the United Nations Charter.[11] It expressed that view one year later when the Senate considered the declaration accepting compulsory jurisdiction of the ICJ.[12] And Senators expressed that view during

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[11] Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State (June 26, 1945) (statement of Secretary of State Edward R. Stettinius, Jr.) ("The first paragraph of Article 94 is a simple statement of the obligation of each Member of the United Nations to comply with the decision in any case to which it is a party. The second paragraph of this Article links this part of the Charter's system of pacific settlement of disputes with other parts by providing that if a state fails to perform its obligations under a judgment of the Court, the other party may have recourse to the Security Council which may, if it deems it necessary, take appropriate steps to give effect to the judgment."). The Charter of the United Nations for the Maintenance of International Peace and Security: Hearings Before the Senate Comm. on Foreign Relations (Senate Hearings) (1945), 79th Cong., 1st Sess. 124-125; 7/10/45 Senate Hearings 286 (statement of Leo Paslovsky, Special Assistant to the Secretary of State for International Organizations and Security Affairs) ("[W]hen the Court has rendered a judgment and one of the parties refuses to accept it, then the dispute becomes political rather than legal. It is as a political dispute that the matter is referred to the Security Council."); id. at 330- 331 (statement of Green H. Hackworth, State Department Legal Adviser (Article 94(2) provides the means of enforcing ICJ decisions).

[12] A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. on Foreign Relations, 79th Cong., 2d Sess. 142 (1946) (statement of Charles Fahy, State Department Legal Adviser) (parties have "a moral obligation" to comply with ICJ decisions, and Article 94(2) constitutes the exclusive means of enforcing such decisions).

debate on accepting compulsory ICJ jurisdiction.[13]

4. The District of Columbia Circuit is the only court of appeals that has addressed the issue, and it has held that ICJ decisions are not privately enforceable. See *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988). In that case, various organizations and individuals claimed that they had been harmed by United States' support for the Nicaraguan "contras" in contravention of a determination by the ICJ that such support violated United States treaty and international law obligations and that the United States was accordingly duty-bound to "cease and refrain from all such acts as may constitute breaches of [its] legal obligations." Id. at 932, quoting 1986 I.C.J. 14, 149. Even though "[t]he United States' contravention of an ICJ judgment may well violate principles of international law," the court of appeals stated that "those violations are no more subject to challenge by private parties in this court than is the underlying contravention of the ICJ judgment." Id. at 934. That court reasoned that "[t]he words of Article 94 'do not by their terms confer rights upon individual citizens;

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[13] 92 Cong. Rec. 10,694 (1946) (statement of Senator Pepper) ("The power of effective enforcement lies only in the Security Council; and in the Security Council an effective decision cannot be made to take action against a State unless there is unanimity of the Big Five. Therefore, so far as the United States is concerned, a power which of necessity will always be a party to the Security Council under the provisions which require the Big Five to be permanent members of the Security Council, the United States will always have the power, through the exercise of the veto, to prevent effective enforcement of a judgment of the Court against the United States."); id. at 10,695 (statement of Senator Connally) ("[W]hen the Court undert[akes] to enforce its judgment by certifying the question to the Security Council, we could tell the Court and the Security Council to take a walk.").

they call upon governments to take certain action.'" Id. at 938 (citation omitted). The reasoning in *Committee of United States Citizens Living in Nicaragua* is correct and should be followed by this Court in rejecting Medellin's claim that the *Avena* decision can be privately enforced on its own terms. Article 94 creates an international obligation on United Nation members to comply with an ICJ decision; it does not empower a private individual to enforce it.[14]

Article 59 of the ICJ Statute, 59 Stat. 1055, provides that "[t]he decision of the [ICJ] has no binding force except between the parties and in respect of that particular case." That statute reinforces what the United Nations Charter establishes – that the ICJ decision is "binding" in the sense that parties have an international obligation to comply with the decision. It does not provide that the ICJ's "binding" decision is judicially enforceable at the behest of individuals in a State's domestic legal system, independent of authorization by the State's political branches. Indeed, the ICJ statute affirmatively negates the possibility of private judicial enforcement because it makes an ICJ decision binding only "between the parties," and a private individual cannot be a party to an ICJ dispute. Thus, the Vienna Convention, the Optional Protocol, the United Nations Charter,

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[14] Courts addressing other provisions of the United Nations Charter have also held that they are not judicially enforceable. See *Flores v. Southern Peru Copper Corp.*, 343 F.3d 140, 156 n.24 (2d Cir. 2003) (United Nations Charter is not self-executing); *Frolova v. USSR*, 761 F.2d 370, 374 (7th Cir. 1985) (Articles 55 and 56 of the United Nations Charter are not self-executing); *Spiess v. C. Itoh & Co. (Am.), Inc.*, 643 F.2d 353, 363 (5th Cir. 1981) (United Nations Charter is not self-executing), vacated on other grounds, 457 U.S. 1128 (1982); *Hitai v. INS*, 343 F.2d 466 (2d Cir. 1965) (Article 55 of the United Nations Charter is not self-executing).

and the ICJ Statute do not either alone or in combination make an ICJ decision, without more, judicially enforceable.

Nor did the ICJ purport to make its *Avena* decision immediately enforceable in United States courts. The ICJ determined that the United States' obligation was "to provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [covered] Mexican nationals." *Avena*, ¶ 153(9) (emphasis added). In arguing that a foreign national can seek freestanding judicial enforcement of the *Avena* decision, Medellin would deprive the political branches of the very choice of means that the ICJ intended for them to have.

In arguing that the ICJ decision is judicially enforceable in it own right, Medellin places great weight on the accepted understanding that the Vienna Convention is self-executing. That reliance is misplaced for two reasons. First, Medellin mistakenly equates a self-executing treaty with a privately enforceable one. As already discussed, while Article 36 is self-executing in the sense that state authorities are required to observe the terms of the Convention by providing information concerning consular assistance and consular access, without implementing legislation, it does not confer any judicially enforceable private rights.

More fundamentally, even if Article 36 were privately enforceable, that would not make an ICJ decision automatically privately enforceable. The United States' obligation to comply with an ICJ decision does not flow from the Vienna Convention, but from Article

94 of the United Nations Charter. And, as the United States has shown, under Article 94, an ICJ decision is not privately enforceable.

III. REGARDLESS OF WHETHER THE PRESIDENT'S DETERMINATION SATISFIES THE CRITERIA IN ARTICLE 11.071, SECTION 5, FOR CONSIDERATION OF A SUCCESSIVE APPLICATION FOR HABEAS RELIEF, THIS COURT IS REQUIRED AS A MATTER OF FEDERAL LAW TO GIVE EFFECT TO THE PRESIDENT'S DETERMINATION

1. Under Article 11.071, Section 5, of the Texas Code of Criminal Procedure, "a court may not consider on the merits" or "grant relief" on any claim raised in a subsequent habeas corpus application "unless the application contains sufficient specific facts establishing that * * * the current claims and issues have not been and could not have been presented previously in a timely initial application * * * because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." Tex. Code Crim. Proc., Art. 11.071, § 5(a)(1). "For purposes of subsection (a)(1), a legal basis of a claim is unavailable on or before the date described in Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date." Id., § 5(d). So too, "for purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described in Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." Id., § 5(e).

The proper construction of Section 5 is a state law question. If this Court construes

Section 5 so that the President's foreign policy determination constituted either a "factual" or a "legal" basis for a claim that "was unavailable" at the time Medellin filed his initial application for state habeas relief, the consideration of Medellin's Vienna Convention claim permitted under Section 5 would coincide with the state court "review and reconsideration" required by the President's determination that state courts give effect to the ICJ's *Avena* decision. Such an interpretation of Section 5's terms would remove any conflict between state limitations on the filing of "subsequent applications" and United States foreign policy imperatives and would obviate resort to federal preemption principles. By contrast, should this Court interpret Section 5 in such a manner that the President's foreign policy determination was not deemed to supply the factual or legal basis for a previously unavailable claim, thereby precluding consideration on the merits of Medellin's Vienna Convention claim, Section 5 would operate in direct contravention of United States foreign policy as determined by the President. In such circumstances, federal law would preempt the operation of Section 5 and require this Court to "review and reconsider[]" Medellin's convictions and sentences to determine whether he suffered actual, non-speculative prejudice at either trial or sentencing as a result of the Vienna Convention violation that was found to have occurred. See *Garamendi*, 539 U.S. at 416-417, 420; *Pink*, 315 U.S. at 223, 230-231; *Belmont*, 301 U.S. at 327, 331.

While the construction of Section 5 is entirely for this Court to determine, on its face, Section 5's language appears broad enough to accommodate the conclusion that the

President's determination provided both the factual and legal basis for a claim that was unavailable at the time Medellin filed his initial application for state habeas relief. As argued above, Article 36 itself does not create "individual rights" that foreign nationals can seek to enforce in the domestic criminal prosecutions. So too, in the absence of a presidential or congressional determination that it should be enforced as a matter of United States foreign policy, the *Avena* decision is not privately enforceable in domestic courts by Medellin or the other covered Mexican nationals. Under that analysis, there was no legal basis for Medellin's Vienna Convention claim until February 28, 2005, when the President made his foreign policy determination that the United States would comply with the ICJ's *Avena* judgment and that state courts should accordingly give effect to that judgment by providing "review and reconsideration" to the claims raised by the 51 covered Mexican nationals. Put another way, Medellin's claim was wholly unavailable before the President made his indispensable determination.

2. Medellin also argues (Br. 53-58) that the *Avena* decision, standing by itself, satisfies the criteria set out in Section 5 for consideration on the merits of a claim that could not have been raised in an initial state habeas application because of its unavailability at the time is a question of state law. This Court need not reach that issue if it find that the President's determination authorizes and requires review and reconsideration under *Avena*. But if this Court does reach the issue – and however it construes Section 5 – it should reject Medellin's underlying premise in urging this Court to

recognize the ICJ's *Avena* decision as constituting either the "legal basis" or the "factual basis" of a claim that was previously "unavailable." As argued above, the *Avena* decision, standing alone, is not privately enforceable by a foreign national in this nation's domestic courts. See pp. 43-48, supra.

Medellin is also incorrect in labeling his Vienna Convention claim as a "constitutional" claim on the theory that the Supremacy Clause makes treaties the law of the land and binding on the States. Br. 58-59. As the Supreme Court has made clear, a treaty has the same status as a federal statute. See *Breard*, 523 U.S. at 376. Moreover, while the Supremacy Clause "secure[s] federal rights by according them priority whenever they come in conflict with state law," the Clause "is not a source of any federal rights." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 613 (1979)). Because of that, the Supreme Court has refused to treat a claim enforceable under the Supremacy Clause as a claim arising under the Constitution. See *Golden State*, 493 U.S. at 107 & n.4 (right secured by the Supremacy Clause is not a right "secured by the Constitution" under 42 U.S.C. 1983); *Chapman*, 441 U.S. at 614-615 (right secured by the Supremacy Clause is not a right "secured by the Constitution" under 28 U.S.C. 1343); *Swift & Co. v. Wickham*, 382 U.S. 111, 126-127 (1965) (injunction sought on the ground that a state statute violates the Supremacy Clause is not sought "upon the ground of the unconstitutionality of such statute" within the meaning of 28 U.S.C. 2281 (1958)).

Thus, "the Supremacy Clause does not convert violations of treaty provisions (regardless of whether those provisions can be said to create individual rights) into violations of *constitutional* rights." *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) (emphasis in original). "Just as a state does not violate a constitutional right merely by violating a federal statute, it does not violate a constitutional right merely by violating a treaty." Ibid. This Court should evaluate the status of the *Avena* decision, standing alone, under Section 5 in light of these considerations.

CONCLUSION

For the reasons stated, this Court should permit review and reconsideration on the merits of applicant Medellin's Vienna Convention claim in light of the President's determination that the United States will discharge its international obligations under the ICJ's *Avena* decision by having state courts give effect to that decision.

Respectfully submitted.

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CERTIFICATE OF SERVICE

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